

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

THE PEPSI BOTTLING GROUP, INC.¹

Employer

and

Case 28-RC-6152

**CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 492, affiliated with the
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS²**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks an election within a unit comprised of approximately 35 truck drivers who regularly sell, merchandise and/or deliver beverages for the Employer. The unit consists of Customer Service Representatives - Conventional Combo; Customer Service Representatives - Full Service; Delivery Drivers - Bay, Delivery Drivers - Bulk, and Customer Service Representatives - Relief employed at the Employer's facility located in Albuquerque, New Mexico. With respect to the latter classification, the Petitioner desires to include in the bargaining unit only those Customer Service Representatives -Relief who perform primarily driving and delivery duties and seeks to exclude those Customer Service Representatives - Relief who perform primarily selling and merchandising functions for the Employer. The Petitioner and Employer stipulated that the following classifications should be excluded from any unit found appropriate: Dispatchers; Marketing Equipment Management employees; Lead Service Technicians; Part-time Merchandisers; Part-time Reset employees; Regular and Relief Sales Operations Managers, Pre-sell Account Managers; casual employees; seasonal employees; clerical employees; guards and supervisors as defined in the Act. The Employer agrees with the Petitioner that all of the classifications in the petition are appropriately included in the bargaining unit but maintains that such a unit, without additional classifications is inappropriate. The Employer contends that the unit must also include the following classifications of employees: Customer Service Representatives - Bulk Accounts B; Merchandisers; all Customer Service Representatives - Relief; Fleet Mechanics; Vending/Cooler Pickup Employees; Fountain Installers; Field Service Technicians; Shop Technicians; Warehouse Forklift Operators; Warehouse Loaders; Checkers; and Full-time Reset employees. With respect to the classification of Customer Service Representatives - Relief, the Employer contends that all employees in this classification should be included, whether they primarily relieve drivers or

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Petitioner appears as corrected at the hearing.

primarily relieve sales employees. The unit proposed by the Employer consists of about 91 employees.

For the reasons discussed in detail below, including such factors as common supervision, the degree of similar training, skills, job functions, and the established history of collective bargaining, I conclude that the petitioned-for unit is inappropriate without the inclusion of the following classifications of employees who are engaged in primarily sales and merchandising functions for the Employer: Customer Service Representatives - Bulk Accounts B, Customer Service Representatives – Small Format Accounts; Merchandisers, Reset employees, and all Customer Service Representatives - Relief employees, whether they perform primarily driving and delivery work or perform primarily sales and merchandising functions. The unit need not include the other classifications the Employer seeks to include as those classifications are not significantly involved in the sales and merchandising of the Employer's beverages at the premises of the Employer's customers, and the employees in those classifications have little and infrequent interaction with the petitioned-for employees.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The parties stipulated, and I find, that the Employer, The Pepsi Bottling Group, Inc., a Delaware corporation, with an office and place of business located in Albuquerque, New Mexico, is engaged in the distribution of soft drinks. During the 12-month period preceding February 20, 2003, the Employer purchased and received at its Albuquerque, New Mexico facility, goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New Mexico. I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the jurisdiction of the Board.

3. **Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** The issue presented in this case is whether the unit sought by the Petitioner is appropriate for bargaining. I have concluded that the petitioned-for unit, which involves drivers who are also involved in sales and merchandising for the Employer is inappropriate. Rather, the smallest appropriate unit must include all of the Employer's

employees engaged in the sale, delivery and merchandising of beverage.³ To provide a context for my discussion of this issue, I will first provide the representation case history involving this Employer facility, an overview of the Employer's operations, followed by a description of the employee complement and their working conditions, and the warehousing and delivery process. I will then present in detail the case law and the reasoning that supports my conclusion on this issue.

A. Background

On March 15, 1982, the Petitioner was certified as the representative of a collective-bargaining unit in Case 28-RD-406. The underlying election in that matter was conducted pursuant to a Stipulation for Certification Upon Consent Election Agreement. The unit certified was:

All drivers including route salesmen and syrup drivers, employed by the Employer at 2121 Claremont Avenue, N.E., Albuquerque, New Mexico; excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined by the Act, as amended.

On February 19, 1986, a decertification petition in Case 28-RD-547 was filed with respect to essentially the same group of employees. On March 3, 1986, the Regional Director for Region 28 of the Board approved a Stipulation for Certification Upon Consent Election Agreement for the following collective-bargaining unit:

All regular full-time and part-time employees classified as soft drink route salesmen, bulk delivery drivers, and merchandisers; excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined by the Act, as amended.

An election was scheduled for March 21, 1986. On March 20, 1986, the Petitioner submitted a written disclaimer wherein it disclaimed any and all right to represent the employees of the Employer in the above-described bargaining unit. The then pending election was cancelled. On March 25, 1986, the Acting Regional Director for Region 28 issued an Order vacating his prior approval of the Stipulation for Certification Upon Consent Election Agreement and further issued an Order Revoking the Certification of Representative that had previously issued in Case 28-RD-406.

At the hearing in the instant case, it was clarified that around 1986, a soft drink route salesperson performed both sales and driver/delivery functions. Over time, due to the

³ As the unit found appropriate herein is larger (74) than the unit requested (35), the Petitioner is accorded a period of 14 calendar days from the date of this Decision and Direction of Election in which to submit to the undersigned an additional showing of interest. In the event the Petitioner does not wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned, within 7 days from the date of this Decision and Direction of Election. If the Petitioner subsequently and timely submits the necessary showing of interest, the National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate.

complexity of the business, some of the sales duties were taken from the drivers and given to sales employees. Thus, there are now fewer delivery drivers, and they spend more of their time performing the delivery and merchandising functions and a lesser percentage of their time in the sales function.

B. Employer's Operations, Hierarchy, and Working Conditions

The Employer's Albuquerque facility is engaged in the warehousing, sale, and distribution of soft drinks and other beverages. From this facility, the Employer also installs, stocks, maintains, and services vending machines, coolers, and fountain equipment to supermarkets and various retail and commercial outlets. The Employer is not engaged in the manufacture and bottling of products at its Albuquerque facility. Its customers consist of mass merchandisers, such as Target, Wal-Mart, K-Mart, Sam's Club, and Costco; convenience stores; gas stations, drug stores; military accounts; restaurants; bars; schools and universities; and various commercial accounts, such as Intel.

Albuquerque's specific market is defined as the "New Mexico/West Texas" market unit, which is a subdivision of the Employer's "Great West Business Unit," headquartered in Denver, Colorado. The market unit services most of the State of New Mexico and a portion of West Texas. "Bulk" and "bay" drivers work out of the Albuquerque facility. The most significant difference between these drivers' functions is the size of the clients, or "accounts" serviced. The bulk drivers deliver beverages to large stores such as Wal-Mart, Target, K-Mart, Sam's Club, but perform no sales work or merchandising functions. Delivery Drivers-Bay, on the other hand, are responsible for delivering and merchandising beverages, as well as performing occasional sales duties. The bay drivers supply beverages to smaller stores such as convenience stores, restaurants, and bars. These clients are sometimes referred to in the record as "express" accounts.

The highest-ranking member of management at the Albuquerque facility is its General Manager, Michael Plichta. The following six management personnel report to Plichta: the Financial Process Manager; the Director of Retail Sales; the Director of On-Premise Sales; the Area Sales Manager; the Marketing Equipment Manager; and the Warehouse Manager.

The Financial Process Manager is responsible for the administrative support of the market unit. She oversees the settlement of accounts of the drivers, reconciles losses, shortages, cash-sharing and unauthorized charges and strives to assure that generally accepted accounting practices are followed. If vending machines appear to be rendering shortages, she will audit those machines with the full service Territorial Sales Manager.

The Director of Retail Sales also reports to Plichta and oversees the key account managers who drive privately-owned automobiles. While the Employer uses the term "manager" freely, there is no record evidence that these "managers" are, in fact, managers or supervisors as defined by caselaw and the Act. Rather, the key account managers call on buyers and district managers of the Employer's largest customers. An individual called the "space manager" reports to the Director of Retail Sales. The space manager oversees one reset

employee who visits stores and favorably re-positions the shelf, cooler or gondola space occupied by Employer beverages.

The Director of On-Premise Sales also reports to Plichta, but the record contains no evidence regarding his or her duties.

The Area Sales Manager supervises the Sales Operation Manager and a variety of Territorial Sales Managers: bulk, full-service, pre-sell, and conventional-combo Territorial Sales Managers.

The Marketing Equipment Manager oversees employees that move, install, and service beverage cooling units (coolers).

Finally, the, also known as the “Product Availability Manager” reports to Plichta. A warehouse supervisor and fleet manager report to the Warehouse Manager.

All employees working out of the Albuquerque facility receive the same fringe benefits, are granted the same holidays off, have the same vacation and leave policy, and are subject to the same employee handbook policies. All of the employees in the unit found appropriate receive similar training though each specific classification also involves substantial on-the-job training. They all wear similar uniforms. There is no evidence as to the specific wage rates/commission rates of employees. There are regular sales meetings held at the Employer’s facility for its entire sales staff, which include the Bulk Merchandisers, Merchandisers and all drivers engaged in selling functions.

The record testimony shows that there is significant interaction between the petitioned-for classifications and the other employees involved in the functions of selling and merchandising beverage for the Employer. With the exception of the bulk delivery drivers, all employees in the unit found appropriate merchandise beverages for the Employer and put up “point of purchase” material, such as promotional advertising displays, pricing tags, and “static clings” (promotion signs that adhere to the sides of coolers.)

C. Classifications Undisputedly Included in the Unit

The parties agree that the following classifications of employees are appropriately included in the unit. Each classification involves drivers who regularly merchandise and deliver beverages for the Employer. Some of the drivers also sell beverages for the Employer. All drivers are supervised by supervisors in the sales department, either the Sales Manager, the Sales Operations Manager or the Area Sales Manager. All drivers are issued Employer-owned cellular phones.

Customer Service Representatives - Conventional Combo

The Customer Service Representative - Conventional Combo classification is more commonly referred to in the record as the “Combo Driver.” The Employer currently employs only one Combo Driver who drives an Employer-owned 16-bay (compartments) side-loading

tractor-trailer, and possesses a commercial driver's license. Because of the truck's configuration, the Combo Driver, like the Full Service Driver, is sometimes called a "bay" driver to distinguish him from the "bulk" drivers who drive large 18-wheel semi tractor-trailers. The Combo Driver wears a uniform, punches a time clock, and is paid a base salary plus a commission, the latter based upon the amount of product sold and delivered. The Combo Driver is primarily responsible for selling, delivering and merchandising products to smaller customers. Merchandising is defined as replenishing and rotating beverages (placing the newest beverage in the back of the rack or shelf and the older beverage in the front of the rack or shelf) at the premises of customers. He primarily services convenience stores, drug stores, smaller grocery stores, and gas stations on a constant route. He does not service large supermarkets or "club" stores such as Costco or Sam's Club.

On a typical day, the Combo Driver arrives at work, punches a time clock, and reports to the drivers' room, where he retrieves a hand-held computer. These computers are used by all of the delivery drivers. The drivers' room consists of tables for performing paperwork and is used by all drivers. The Combo Driver uses the handheld computer to print out an inventory of products that will be stocked on his truck that day and ascertains its accuracy. The Combo Driver, if need be, retrieves "point of purchase" material, such as promotional advertising displays, pricing tags, and "static clings" (promotion signs that adhere to the sides of coolers). The Combo Driver walks across the street from the warehouse to another parcel of property where the Employer's truck parking lot is located and performs a pre-trip safety inspection on the truck, checking the tires, fluid levels, and similar safety items. If a serious defect is found, this information is communicated to the fleet mechanics. If a review of the inventory on the truck discloses a deficiency, a warehouse employee brings the needed product to the truck, or, if it is a small deficiency, the driver will simply retrieve the product from the warehouse. There is no record testimony as to how frequently a Combo Driver directly retrieves product from the warehouse; however, a Delivery Driver-Bay, whose duties as discussed below are substantially the same as a Combo Driver, estimated the frequency that such retrievals occur as once per month. There is no record evidence as to how frequently a warehouse employee brings needed product to the truck driven by the Combo Driver.

After his truck is loaded with product, the Combo Driver then drives it to a parking lot station manned by a "Checker" who reviews the inventory sheet of the vehicle and ascertains that the inventory carried on the truck is accurate. The Combo Driver leaves the Employer's premises to begin delivering the route. Upon arrival at the first stop, the Combo Driver stocks and rotates beverages (repositions the oldest beverage to the front of the shelf or rack and puts the newer beverage towards the back of the rack) at the customer's premises. The beverages have freshness dates listed on them. If any beverage is expired, it is his duty to remove the product from the store and return it to the warehouse. It is the Combo Driver's duty to look for additional selling opportunities and increase the amount of sales delivered on his routes. He, like all other drivers except bulk drivers, is responsible for placing "point of purchase" advertising signs on customer shelves and coolers. Upon completion of delivering the route, the Combo Driver returns to the same parking lot and proceeds to the drivers' room where he downloads the information from his handheld computer and reconciles with the cashier any monies received during the route. Warehouse loaders stock the Combo Driver's truck during the night based on the information inputted from the handheld computer. As with drivers in other classifications,

there is little and infrequent interaction between the Combo Driver and the employees in the other excluded classifications, such as forklift operators, installation employees, service technicians and mechanics.

A wage survey is conducted on an annual basis by the Human Resources Manager to determine the pay increases for the Combo Driver. The Combo Driver works from 6:30 a.m. to 4:30 p.m.

Delivery Drivers-Bay

The Employer employs 16 Delivery Drivers-Bay who drive a 16-bay (compartments) side-loading tractor-trailer, and possess commercial driver's licenses. Like the Combo Driver and Full Service Drivers, they wear uniforms and are paid a base salary plus a commission, the latter based upon the amount of product sold and delivered. Like the Combo Driver, Delivery Drivers-Bay service smaller grocery stores, convenience stores, gas stations and other customers on a given route. Delivery Drivers-Bay follow the same the same daily routine and perform the same functions as the Combo Driver, with the exception of being assigned full selling duties. Indeed, the Combo Driver is merely a Delivery Driver-Bay who has been assigned full selling duties on his route. Notwithstanding the fact that Delivery Drivers-Bay do not perform the full panoply of sales function, all Delivery Drivers-Bay are expected to routinely seek out and increase the amount of sales to customers, especially when the Employer is having a special promotion when it grants incentives to its employees to sell more product. Delivery Drivers-Bay do not service vending machine accounts. As with drivers in other classifications, there is little and infrequent interaction between the Delivery Drivers-Bay and the employees in the other excluded classifications, such as forklift operators, warehouse employees, installation employees, service technicians, and mechanics. The Delivery Drivers-Bay begin work from 5:15 a.m. to 7:00 a.m. with quitting times ranging from 3:15 p.m. to 5:00 p.m.

Customer Service Representatives - Full Service

The Employer employs eight Customer Service Representatives - Full Service employees more commonly referred to as "Full Service Drivers." They punch time clocks and are paid a base salary plus a commission, the latter based upon the amount of product sold and delivered. Full Service Drivers are required to possess at least a "B" class commercial driver's license. In fact, all of the Full Service Drivers employed by the Employer possess the higher rated "A" class commercial driver's license which permits them to drive larger vehicles. They operate a side-loading, 10-bay straight truck with a box on the back, also known as a bobtail truck. The Full Service Territory Sales Manager supervises the Full Service Drivers.

The typical day of a Full Service Driver is similar to that of the Combo Driver. The Full Service Driver arrives at work, punches a time clock, and finds his immediate supervisor to obtain the keys to the vending machines he will re-stock that day. The supervisor gives the Full Service Driver a list of vending machines that must be filled and the Full Service Driver downloads information from his handheld computer. He prints out from the computer his truck inventory, obtains bags for retrieving money from the vending machines, crosses the street to the truck parking lot, performs a pre-trip safety inspection, and inventories the product already

loaded onto the truck. If something is missing, like the Combo Driver, he may retrieve it himself from the warehouse or, if it is a large quantity, have a warehouse employee load it onto his truck. As previously noted, the frequency of such retrieval of product by a driver from the warehouse was estimated as once per month. The Full Service Driver drives his truck to the checking station where a checker ascertains that the product carried on the truck matches the truck's inventory list.

When the Full Service Driver arrives at the first stop, he exits the truck and inventories the beverage vending machine to determine the amount of product required. Money contained in the machine is emptied into a numbered money bag, and the machine is re-stocked with new product. If there is a simple jam detected in the machine, the driver will clear the jam. If a more serious defect is detected, the driver will call a "1-800" number and report the problem. The Full Service Driver is not trained or skilled in HVAC (heating, venting, air conditioning) repair and does not attempt to repair machines. After servicing a vending machine, the driver returns to his truck and inputs data into the handheld computer, including the number imprinted on the money bag used at that stop and the amount of product re-stocked, by flavor and type. The driver then "closes the sale" by printing an invoice from the handheld computer. The driver also enters data of product used into a paper route book. If the driver discovers a full vending machine that did not require re-stocking, he notes this in the route book. Only Full Service Drivers utilize route books.

In the event that a Full Service Driver determines that a particular stop on a route would benefit from having additional vending machines stationed there, the appropriate sales employees are informed to make the sale. It benefits the Full Service Driver to search out and find opportunities for increased sales as his commission compensation increases with greater sales.

Full Service Drivers spend about a quarter of their time substituting for Delivery Drivers-Bay. Most of this time is spent during the summer months when their need to service vending machines at facilities such as schools diminishes.

Full Service Drivers, like Combo Drivers and Delivery Drivers-Bay, have little contact with warehouse employees. They will contact the warehouse supervisor to complain if their truck is loaded improperly. The only time the drivers interact with a warehouse person is when a warehouse employee is called in the morning to re-load an improperly loaded truck or bring needed product from the warehouse. Full Service Drivers' contact with mechanics is similar to that of all of the drivers. In essence, the only contact with mechanics is when, during the pre-trip inspection, they discover a mechanical defect on their truck that can be quickly fixed. If a truck gets a flat tire while servicing a route, a subcontractor (not an Employer mechanic) will come to repair the flat. If a maintenance issue is discovered during the pre-trip inspection or develops while on the road, an Employer mechanic may come to the truck. The record does not reflect how frequently such mechanical problems occur. As with drivers in other classifications, there is little and infrequent interaction between the Full Service Drivers and the other employees in the excluded classifications, such as forklift operators, installation, and service employees.

When a Full Service Driver is not working for any reason, the Full Service Driver's job, like that of all drivers, is performed by another driver or a Customer Service Representative - Relief. Employees in the excluded classifications, such as mechanics, installers, forklift operators, loaders and technicians never substitute for any of the product delivery drivers as they are not skilled at performing the driving and delivery work. The Full Service Driver works from 7:00 a.m. to 4:00 p.m.

Delivery Drivers-Bulk

The Employer employs five Delivery Drivers-Bulk who operate large 18-wheel semi-tractor-trailers. Their pre-delivery day is similar to that of all the other drivers. They are required to perform a daily pre-trip safety inspection on their truck and have the inventory checked before the truck leaves the facility. The most conspicuous difference between the Delivery Drivers-Bay and the Delivery Drivers-Bulk is the size of the truck driven. Delivery Drivers-Bay drive smaller trucks and deliver beverage by the case. Necessarily, they stock and shelve the beverages at the stores. Delivery Drivers-Bulk, on the other hand, drive large semi tractor-trailers and deliver product by the pallet. They wear uniforms, punch time clocks, are hourly paid, and receive no commission. They are required to maintain a commercial driver's license. Unlike the Delivery Drivers-Bay, who use hand carts to service customers with product from their smaller trucks, Delivery Drivers-Bulk unload beverage from their tractor/trailers with hydraulic pallet jacks. Unlike the other drivers petitioned-for by the Petitioner, the Delivery Drivers-Bulk take no sales orders, and do not stock or rotate beverages on store shelves or in vending machines. Also, unlike other drivers, they are not involved in the placement of "point of purchase" advertising signs on the sales floor. Rather, they unload and retrieve large pallets of beverage into the backrooms of large clients such as Sam's Club and Costco. As with drivers in other classifications, there is little and infrequent interaction between the Delivery Drivers-Bulk and the employees in the excluded classifications, such as forklift operators, warehouse loaders, service technicians, and mechanics. Delivery Drivers-Bulk begin work between 2:00 a.m. and 4:00 a.m. with quitting times ranging from 11:00 a.m. to 12:00 p.m.

Customer Service Representatives –Relief Customer Service Representatives-Bulk Relief

The Employer employs about eight Customer Service Representatives – Relief and Customer Service Representatives-Bulk Relief employees, who all possess commercial driver's licenses. They are at times referred to as Utility CRS. They wear uniforms, are paid on a hourly basis, and receive no commission. They are supervised by the Sales Operations Manager. The parties agree all but three of the relief persons are appropriately included in the bargaining unit as they primarily relieve drivers. With respect to these three employees, the Petitioner contends that these remaining three relief employees primarily relieve employees who are engaged in sales or merchandiser functions. As the Petitioner does not seek to represent the sales or merchandiser employees, the Petitioner would exclude from the bargaining unit any Relief employee primarily involved in the relief of non-driving employees. The Petitioner presented no evidence to support its contention. The Employer, who on the other hand contends that all of the Customer Service Representatives - Relief employees generally relieve drivers and should be included in the unit,

presented testimony that although some of the Relief employees spend more of their time relieving sales and merchandising employees as opposed to relieving drivers, and other spend more time relieving drivers rather than sales and merchandising employees, all of the Customer Service Representatives -Relief regularly perform delivery, sales, and merchandising functions. Customer Service Representatives - Relief employees involved in the relief of Bulk Drivers begin work between 3:30 a.m. and 5:30 a.m. with quitting times between 1:30 p.m. and 3:30 p.m., when they are substituting on routes. If they are not substituting on a route, they work from 6:00 a.m. to 3:00 p.m. Customer Service Representatives -Relief employees who relieve employees other than non-bulk drivers, work from 6:00 a.m. to 2:00 p.m.

D. Disputed Classifications:

The Employer maintains that the following classifications of employees must be included in any appropriate unit. The Petitioner opposes the inclusion of these classifications in the bargaining unit:

Customer Service Representatives - Relief

As previously noted, the Petitioner seeks to include in its proposed unit the five or so Customer Service Representatives - Relief employees that perform primarily delivery duties but to exclude from the bargaining unit any relief person that primarily relieves Merchandiser employees rather than drivers. There are perhaps three Relief employees that fall into this latter category. All Customer Service Representatives - Relief employees, like the drivers and merchandisers, sell, merchandise and/or deliver products at the Employer's customers.

Customer Service Representatives - Bulk Accounts B

The Employer employs 13 persons as Customer Service Representatives - Bulk Accounts B employees in this classification, more commonly referred to in the record as Bulk Pre-Sell, who wear uniforms, and are paid a base salary and commission. They report to the Sales Operation Manager, drive privately owned automobiles, sell, merchandise and occasionally deliver beverages. They primarily service larger "bulk" accounts such as Costco, Sam's Club, and other large clients. They routinely meet with store managers to ensure that accounts are being handled properly. They merchandise the beverages after they are delivered to the stores by replenishing beverages and rotating the product and placing advertising signs on shelves, end-caps, and coolers. They make certain that shelves are clean.

Customer Service Representatives-Bulk Accounts B drive directly to the stores from their homes rather than from the Employer's facility. Once each week a sales meeting is held at the facility and the Customer Service Representatives-Bulk Accounts B attend. Customer Service Representatives-Bulk Accounts B do not possess commercial driver's licenses and infrequently deliver product. The Employer issues them electronic paging devices (pagers), rather than cell phones, but they sometimes carry their personal cell phone and receive reimbursement from Employer for business calls. Customer Service Representative-Bulk Accounts B spend the better part of their work-day at the premises of customers, selling and merchandising product. The

Customer Service Representative-Bulk Accounts B begin work between 3:30 a.m. and 5:30 a.m. with quitting times ranging from 1:30 p.m. to 3:30 p.m.

Customer Service Representatives-Small Format Accounts

The record reflects that the Employer employs 13 employees which I shall term Customer Service Representatives-Small Format Accounts. The record refers to these employees variously as Pre-Sell Representatives, Express CRs, and Small-Market Pre-Sell. Neither party takes a specific position regarding their inclusion or exclusion; however, by extension of the respective positions taken by the Parties, I will assume for the purpose of discussion that the Petitioner would exclude these employees and that the Employer would include them.

Customer Service Representative-Small Format Accounts is a new position with the Employer. I was created in March 2002. Essentially, this position was severed from the duties previously performed by the Delivery Drivers-Bay. Customer Service Representatives-Small Format Accounts have taken over the responsibility from the Delivery Drivers-Bay of selling product to the accounts of Delivery Drivers-Bay. Delivery Drivers-Bay only make deliveries, merchandise, and engage in limit sales duties with respect to these accounts.. Unlike Delivery Drivers-Bay, Customer Service Representatives-Small Format Accounts drive their own vehicles in performing their duties. They are paid a flat mileage rate to compensate them for using their own vehicles. They are provided with a cellular telephone by the Employer. They receive a base pay plus a commission determined by the volume of their sales. They do not attend the meetings that are held with Delivery Drivers-Bay. The drivers, however, are kept informed of sales related promotions and pricing that Customer Service Representatives-Small Format Accounts might be presenting to route customers. Customer Service Representatives-Small Format Accounts report to the Small Format Territory Sales Manger, who in turn reports to the Sales Operations Manager.

Merchandisers

The Employer employs eight full time Merchandisers who wear uniforms and are paid an hourly wage. They report to the Sales Operation Manager, drive privately owned automobiles and do not generally deliver product no run routes. In general, merchandisers service the bulk accounts on Sunday and Monday when the are off duty. During the week, Merchandisers are used as helper on bulk accounts. Merchandisers do not carry handhelds, but in terms of customer relations, they go through the same functions as a Customer Service Representatives-Bulk at a bulk client's facility. The Merchandisers duties include filling the customer's shelves and racks, and rotating the product and placing advertising signs as needed. They look for outdated product, ensure that product is up to merchandising standards. They search for ways to sell additional displays. On occasion, the Merchandisers also provide Sunday and Monday service the smaller accounts serviced during the week by the "Delivery Drivers-Bay. For example, a very aggressive advertisement might require the attention of a Merchandiser on the off day of a Delivery Driver-Bay.

Merchandisers drive their own vehicles directly to the Employer's customers. They receive a flat fee for the use of their vehicles. They do not possess a commercial driver's license and are issued electronic pagers, rather than cell phones, but sometimes carry their personal cell phone and receive reimbursement from the Employer for business calls. Merchandisers, like the petitioned-for employees, spend the better part of their workday at the premises of customers, selling and merchandising product. The Merchandisers work from 5:30 a.m. to 1:30 p.m.

Reset Employee

The Reset Employee wears a uniform, is hourly paid, and drives an Employer-owned van. He visits customers and favorably re-positions the shelf, cooler and/or gondola space occupied by Employer beverages. His work is essentially like that of a merchandiser who is involved in special merchandising projects. The record does not reflect whether or not he is required to possess a commercial driver's license. Like other employees in the unit found appropriate herein, the Reset Employee spends outside of the Employer's facility traveling to customers and merchandising products. He works from 7:00 a.m. to 3 p.m.

Fleet Mechanics

An unspecified number of hourly paid fleet mechanics, who wear uniforms, are responsible for the repair and maintenance of all of the Employer's trucks and automobiles, as well as its other mechanical equipment such as forklift trucks and pallet jacks. As fleet mechanics sometimes drive the vehicles they repair, they are required to possess a commercial driver's license. The Employer asserts that they interact with the drivers in the petitioned-for classifications but the evidence indicates that this would only occur if a driver experienced a mechanical problem on his truck that could be promptly fixed by a mechanic. This would usually happen during the morning pre-trip inspection of the vehicle. There is no evidence as to how frequently such mechanical problems occur. The Marketing Equipment Manager supervises all mechanics.

Unlike the employees in the unit found appropriate herein, the fleet mechanics do not sell, merchandise or deliver product. Their function is solely to repair and maintain the Employer's fleet of trucks and other equipment. They have very little and infrequent interaction with this group of employees who have skills which are radically different from the employees in the unit found appropriate herein. The Fleet Mechanics begin work between 5:30 a.m. and 8:30 a.m., with quitting times ranging from 3:15 p.m. to 6:15 p.m.

Warehouse Forklift Operators

The Employer employs an unspecified number of forklift operators in the warehouse. They do not possess a commercial driver's license but are required to possess a license to operate a forklift truck. The forklift operators wear uniforms, are paid an hourly wage rate and receive no commission. They are responsible for loading and unloading trucks and much of this activity is done at night after the drivers have left for the day. Forklift operators sometimes move coolers for the Marketing Equipment Manager. If a driver requires a second load of beverage during the

day, he may interact with a forklift operator while obtaining this re-load. The record does not state how frequently such interaction occurs. Unlike the employees in the unit found appropriate herein, the warehouse forklift operators do not sell, merchandise or deliver product to the Employer's customers. The sales employees, drivers, and merchandisers have very little and infrequent interaction with this group of employees who have skills which are radically different from the employees in the unit found appropriate herein. The Forklift Operators begin work from 5:30 a.m. to 8:30 a.m., with quitting times ranging from 3:15 p.m. to 6:15 p.m.

Warehouse Loaders

The Employer employs an unspecified number of warehouse employees in the classification of Warehouse Loader. They wear uniforms, are paid an hourly wage and receive no commission. Some Loaders move trucks from the parking lot to the warehouse and back, and are thus required to possess a commercial driver's license. The loading work is done at night when the drivers are not at the warehouse. Unlike the employees in the unit found appropriate herein, the warehouse loaders do not sell, merchandise or deliver product to the Employer's customers. Rather, the Loader receives information on the amount and types of product to load onto the trucks via the handheld computer data and works primarily in the warehouse stocking the trucks. Their only meaningful interaction with would occur when a truck needed to be restocked because of an error. The record does not disclose how often that would occur. On a frequency of about once per month, a driver may enter the warehouse and pull some needed beverage directly from the pallets therein to directly load onto his truck. The sales employees, drivers, and merchandisers have very little and infrequent interaction with this group of employees who have skills which are radically different from the employees in the unit found appropriate herein.. It is unclear as to what the hours of the Warehouse Loaders are, but the record indicates that they work at night.

Checkers

The Employer employs an unspecified number of Checkers who, as previously noted, conduct physical inventories of the trucks departing and returning to the Employer's facility. The Checker counts the number and types of cases of beverage on the bay trucks and the number and types of beverage on pallets on the bulk trucks. Unlike the employees in the unit found appropriate herein, the warehouse checkers do not sell, merchandise or deliver product to the Employer's customers. The record does not reflect how the Checkers are paid (hourly versus salaried, etc.). The Warehouse Supervisor supervises the Checkers. The working hours of the Checkers are not set forth in the record but they presumably work during the day time hours when the trucks are departing from, and returning to, the Employer's facility. The only interaction between the drivers and the Checkers occurs when the drivers are departing and returning to the facility and having their inventories reviewed by the Checkers. The interaction stops there. The drivers spend most of their day on the road delivering beverage to customers. The Checkers, like other warehouse employees, remain the entire day at the facility and do not visit customers. The job function of the Checker, taking inventories of trucks, is considerably different from that of the, who spend the better part of their day at the premises of customers selling, merchandising and delivering beverage.

Vending/Cooler Pickup Employees

The Employer employs two persons in this classification who report to the Marketing Equipment Manager, wear a uniform, are paid on an hourly basis, and receive no commission. They drive a flatbed stake truck (also known as a “box” truck) used to deliver vending machines, refrigerators/coolers. There is no evidence of these employees ever actually delivering beverage products. However, they may on some occasions deliver product to initially stock a vending machine. The record does not indicate how often this occurs. Unlike the employees in the unit found appropriate herein, the Vending/Cooler Pickup Employees do not sell, merchandise or regularly deliver product to the Employer’s customers. Their primary job is to deliver new vending machines and coolers to customers and to retrieve vending machines and coolers in need of repair and move them to their shop area, and return the machines to customers after repair. The job function of the Vending/Cooler Pickup Employees (retrieving and delivering vending machines and coolers) is considerably different from that of the sales employees, drivers, and merchandiser who spend the better part of their day at the premises of customers selling, merchandising and delivering beverage. The Vending/Cooler Pickup Employees begin work between 5:30 a.m. and 8:30 a.m. with quitting times ranging from 3:15 p.m. to 6:15 p.m.

Marketing Equipment Delivery/Installer

The Employer employs one Marketing Equipment Delivery/Installer, more commonly referred to in the record as “Fountain Installer,” who drives an Employer-owned pickup truck. The Fountain Installer wears a uniform, and receives an hourly wage and no commission. He is responsible for the installation and retrieval of fountain equipment from restaurants, grocery and convenience stores. The Fountain Installer does not generally deliver beverages for the Employer although the Employer’s General Manager testified that “it has been known to happen.” There is no evidence as to the frequency of this happening. Unlike the employees in the unit found appropriate herein, the Fountain Installers do not sell, merchandise or regularly deliver product to the Employer’s customers. The job function of the Fountain Installer (installing and retrieving fountain equipment) is considerably different from that of the employees in the unit found appropriate herein who spend the better part of their day at the premises of customers selling, merchandising and delivering beverage. The fountain installer begins work between 5:30 a.m. and 8:30 a.m. with quitting times ranging from 3:15 p.m. to 6:15 p.m.

Field Service Technicians

The Employer employs an unspecified number of Field Service Technicians who drive Employer-owned pickup trucks. They wear a uniform, and receive an hourly wage rate and no commission. Like the installer, they drive a company-owned pickup truck. Unlike the drivers and merchandisers, the Field Service Technicians do not sell, merchandise or regularly deliver product to the Employer’s customers. The Field Service Technicians are responsible for the repair of Employer coolers, vending machines and fountain equipment. The drivers appear to have little or no interaction with this group of employees who have skills which are radically different from sales employees, drivers, and merchandisers. The Field Service Technicians

begin work between 5:30 a.m. and 8:30 a.m. with quitting times ranging from 3:15 p.m. to 6:15 p.m.

Shop Technician/Vending/Cooler Employee

There are two Shop Technician/Vending/Cooler Employee, more commonly referred to in the record as Shop Technicians. They wear a uniform, and receive an hourly wage rate and no commission, and are responsible for the preparation and readiness of all of the Employer's beverage equipment, including coolers, fountain and vending machine equipment, prior to installation at the premises of customers. The Shop Technicians ascertain that the equipment is in proper working order, has the correct number of shelves, has the proper flavor strips, and is otherwise ready to be installed. If it is anticipated that a particular installation will be difficult, a Shop Technician might drive an Employer vehicle to the customer's location to assist with installation. Unlike the employees in the unit found appropriate herein, the Shop Technicians do not sell, merchandise or regularly deliver product to the Employer's customers. The employees in the unit found appropriate herein appear to have little or no interaction with this group of employees who have skills which are radically different from the sales employees, drivers, and merchandisers. The Shop Technicians begin work between 5:30 a.m. and 8:30 a.m. with quitting times ranging from 3:15 p.m. to 6:15 p.m.

E. Legal Analysis and Determination:

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act," *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494-97 (1985). The Board's discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting; it need not choose the most appropriate unit, *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991); *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988).

The Petitioner asserts that the petitioned-for unit is appropriate as the classifications therein consist of the Employer's drivers who routinely deliver beverages to the Employer's customers. The Employer contends that a unit of drivers, including the Employer's relief drivers is inappropriate because if one applies normal community-of-interest standards, the appropriate unit must include the entire sales staff, all warehouse employees as well as mechanics, field technicians and installers. Based upon the record described above and existing Board law, it is concluded that the petitioned-for unit is inappropriate without the inclusion of the sales and merchandising employees, as they, like the petitioned-for drivers, engage in the common endeavor of selling and merchandising beverages at the premises of Employer customers.

The Board has found that a unit of drivers may be an appropriate unit for collective bargaining when it is established that the drivers comprise a distinct and homogeneous group. The issue to be determined is whether the petitioned-for unit of drivers is appropriate. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB No. 24 (2002); *Home Depot USA, Inc.*, 331 NLRB 1289 (2000). If the petitioned-for unit is inappropriate, the appropriateness of a broader unit encompassing other classifications, must be

examined. When drivers are involved in a unit determination, the Board has developed certain placement criteria for case-by-case evaluation of community of interest, in recognition of the wide variation in conditions of employment of drivers. *E.H. Koester Bakery Co.*, 136 NLRB 1006 (1962); *Airco, Inc.*, 273 NLRB 348 (1984). In *Koester*, supra at 1011, the Board set forth the following factors to be considered in making unit determinations involving drivers:

- (a) whether the truck drivers and the other employees have related or diverse duties, the mode of compensation, hours, supervision and other conditions of employment; and
- (b) whether they are engaged in the same or related production processes or operation, or spend a substantial portion of their time in such production or adjunct activities.

Also: *Overnite Transportation Company*, 322 NLRB 723 (1996); *Ore-Ida Foods*, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995). In *Rockford Coca-Cola Bottling Co.*, 81 NLRB 579 (1949), the Board found a unit of route salesmen to be an appropriate unit. In that case, the route salespersons engaged in driving, delivery and selling work. The refrigeration maintenance employees and mechanics were excluded because their employment and responsibilities differed from the route salesmen. Similarly, in *Mexico Coca-Cola Bottling Co.*, 88 NLRB 421 (1950), a unit limited to driver-salesmen was found to be appropriate. In *Dr. Pepper Bottling Company of Fort Worth*, 228 NLRB 1119 (1977), an employer contended that a unit of drivers, dispatchers and sales employees was inappropriate and must include the warehouse employees, including loaders and maintenance employees. The Board found a lack of community of interest between the warehouse employees and the petitioned-for employees.

In the instant unit, in the past, the driver/delivery employees of the Employer performed the entire sales function as well as the merchandising and delivery functions. More recently though, the Employer has transferred a portion of the selling duties from the drivers to the sales employees. In these circumstances, the unit petitioned-for, which already includes employees engaged in the selling and merchandising functions, must include all employees engaged in selling and merchandising functions in order to be appropriate. Those additional classifications which also engage in primarily sales and/or merchandising work are the Customer Service Representatives - Bulk Accounts B, Customer Service Representatives – Small Market Accounts Merchandisers, and the Reset Employee, in order to be appropriate. I will refer generically in this Decision to the latter four classifications as the “sales and merchandisers.” I will refer to the classifications of Fleet Mechanic, Warehouse Forklift Operators, Warehouse Loaders, Checkers, Marketing Equipment Manager Delivery/Installers, Field Service Technicians, Shop Technicians and Vending/Cooler Pickup Employees as the “service, installation and warehouse employees.”

The drivers, sales, and merchandisers herein are supervised separately from the service, installation and warehouse employees. They all have as their third line of supervision the Area Sales Manager. While some of the Warehouse Loaders may possess a commercial driver’s license to move the trucks in and out of the warehouse, driving trucks is only incidental to the job function and does not demonstrate substantial interchange. Contrary to the Employer’s position, the degree of functional integration between drivers and merchandisers versus the

service, installation and warehouse employees is insufficient to establish that a unit limited to employees selling, merchandising and delivering beverage lacks a separate community of interest. In *Home Depot USA*, 331 NLRB 1289 (2000), the Board reversed the acting regional director, and held that the petitioned-for unit of drivers and dispatchers constituted an appropriate unit, although drivers spent up to 30 to 40 percent of their work time inside the store “pulling” merchandise, and, non-drivers occasionally accompanied drivers on deliveries. The drivers and merchandisers herein spend an insubstantial amount of time in the warehouse. Drivers sales employees, and merchandisers do not significantly participate in the selection, moving and loading of beverage to and from the trucks and the warehouse. Little time of the drivers, sales employees, and merchandisers is spent at the employer’s facility. Even of that small amount of time, the amount of time spent by drivers sales employees, and merchandisers in the retrieval of merchandise from the warehouse is not substantial. See, *Home Depot USA* supra; *Rinker Materials Corporation*, 294 NLRB 738 (1989); Cf. *Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61 (1971).

The fleet mechanics work primarily in the shop and engage in repair work which other employees are unable to perform. Like the Fountain Installers, Field Service Technicians and Delivery/Vending/Cooler employees, they are highly qualified in mechanical skills and have qualifications the drivers, sale employees, and merchandisers lack. Moreover, there appears to be little or no interchange or interaction between these service and installation employees and the employees found to be an appropriate unit herein. While a unit including these classifications may be found to be appropriate despite these differences, this does not make a unit excluding these classifications inappropriate under Board precedent. See, e.g.: *Overnite Transportation Co.*, supra, where the Board found that a driver unit could either include or exclude mechanics and be appropriate.

In the instant case, all employees engaged in the functions of selling, merchandising and delivering beverage to the Employer’s customers constitute a distinct and homogeneous group. They all undergo intensive on-the-job training. Unlike the warehouse employees who stock the trucks at night, the drivers, sales employees, and merchandisers all work during the daytime hours, spend a good part of their day driving a vehicle, and spend most of their time at the premises of a customer. The infrequent instances of drivers retrieving a case or so of product from the warehouse are insufficient to establish a community of interest which would compel the inclusion of the warehouse employees in the unit .

The drivers and merchandisers are all under the supervision of the sales department. The record reveals that almost all, if not all, of the employee in the unit found appropriate earn commission or, at least on occasion, have the possibility to increase their earnings through Employer sales incentive programs. There is no evidence that any of the employees excluded from the unit are permitted to participate in these sales incentive programs.

The record is not clear but it appears that most of the employees in the excluded classifications work under either the Marketing Equipment Manager or the Warehouse Manager. The evidence shows that the drivers, sales employees, and merchandisers possess dissimilar qualifications and skills quite distinct from the service, installation, and warehouse employees, as demonstrated by the fact that none of the service, installation, and warehouse employees ever

substitutes for a driver or merchandiser. Likewise, no driver, sales employee, or merchandiser can perform the functions of the forklift operators, loaders, checkers or mechanics or other employees in the service, installation, and warehouse classifications. Furthermore, there is virtually no integration of work functions between the drivers, sales employees, and merchandisers and the service, installation, and warehouse employees. Drivers and merchandisers never substitute for service, installation, and warehouse employees as they lack the skills and qualifications necessary to perform those functions and vice versa. For example, there is no evidence of any driver, sales employee, or merchandiser having driven a forklift truck or acted as an installer or mechanic. Conversely, there is no evidence of any service, installation, or warehouse employee ever having served as a driver, sales employee, or merchandiser. On the contrary, there is a high degree of integration of work functions between the drivers, sales employees, and merchandisers. They are all essentially performing the same function of selling, merchandising, or delivering beverages at the premises of the Employer's customers.

As previously noted, the parties agree that the majority of Customer Service Representatives - Relief employees are appropriately included in the unit. I so find that they should be included in the unit as it appears that they spend a majority of their time relieving the drivers that are included in the unit. The record indicates that the only difference between the agreed upon employees and the remaining relief employees is that the latter personnel spend much of their time relieving merchandisers rather than drivers. As I have found that the merchandising employees are appropriately included in the unit, it is appropriate to also include in the unit those employees who routinely substitute for them. Thus, all employees in the classification of Customer Service Representatives - Relief will be included in the unit.

Based upon these circumstances, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All Customer Service Representatives - Conventional Combo employees, Customer Service Representatives - Full Service employees, Delivery Drivers-Bay, Bulk Delivery Drivers, Customer Service Representatives - Bulk Accounts B employees, Customer Service Representatives - Small Format Accounts employees, Customer Service Representatives -Relief employees, , Merchandisers, and Reset Employees employed by the Employer at its facility located in Albuquerque, New Mexico.

EXCLUDED: Fleet Mechanics, Warehouse Forklift Operators, Warehouse Loaders, Checkers, Vending/Cooler Pickup Employees, Marketing Equipment Delivery/Installers, Field Service Technicians, Shop Technician, Dispatchers, Marketing Equipment Management employees, Lead Service Technicians, Part-time Merchandisers, Part-time Reset Labor employees, Regular and Relief Sales Operation Managers, Pre-sell Account Managers, casual and seasonal employees, clerical employees, guards and supervisors as defined in the Act.

There are approximately 74 employees in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers, but who have permanently been replaced, as well as their replacements are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 492,
affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the NLRB Resident Office, Compass Bank, 505 Marquette Avenue, N.W., Suite 1820, Albuquerque, New Mexico, 87102-2181, on or before April 18, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in

Washington must receive this request by April 25, 2003. A copy of the request for review should also be served on the undersigned.

DATED at Phoenix, Arizona, this 11th day of April 2003.

/s/Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board - Region 28

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